

Permissibility of Egypt's Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women

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**PERMISSIBILITY OF EGYPT'S RESERVATIONS TO THE
CONVENTION ON THE ELIMINATION OF ALL FORMS OF
DISCRIMINATION AGAINST WOMEN**

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INTRODUCTION

In most countries of the Middle East, relations between the sexes are guided by Islamic laws and traditions. Like any system of jurisprudence, however, Islamic law (Shari'a) is subject to continuous interpretation and reformulation. Egypt provided both the climate and leadership in the early twentieth century that inspired a reassessment of Islamic law and women's rights throughout the Arab world. Consistent with that tradition, Egypt is among the few Arab countries which have ratified the Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention).¹ However, because of the preeminence of Islamic law in the family law of Egypt, Egypt has

1. G.A. Res. 34/180 (Dec. 18, 1979), 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter Women's Convention].

Countries that have ratified or acceded to an international treaty are called "States Parties" to that treaty. Through ratification or accession a country agrees to be legally bound by the treaty's provisions. As of June 1, 1991, the other Arab States that are also parties to the 1979 Convention are Iraq, Tunisia, and the Republic of Yemen. See DPI/1145 - July 1991 - 2M, pamphlet published by the United Nations Department of Public Information.

made reservations to the Women's Convention.² This comment analyzes the permissibility of those reservations under international law.

Part I of this comment provides a general background to the Women's Convention and summarizes Egypt's reservations to that agreement. Part II examines general principles of international law governing treaty reservations and the permissibility of reservations to conventions on human rights. The section then applies those principles to Egypt's reservations to Articles 2 and 9 and concludes that the reservations are impermissible.

Part III outlines the legal traditions underlying Egypt's reservation to Article 16, and Part IV explores the social and political context that gave rise to the reservation. Part V analyzes the compatibility of Egypt's reservation to Article 16 with the object and purpose of the Women's Convention.

This comment concludes that although Egypt's reservations to Articles 2 and 9 of the Women's Convention are impermissible, its reservation to Article 16 of the Convention is permissible. Egypt's reservation to Article 2 is impermissible because it is a general repudiation of the most important provision of the Convention. Egypt's reservation to Article 9 is impermissible because it compromises the integrity of the Convention without promoting its universal adoption. However, Egypt's reservation to Article 16 is permissible because it promotes universal application of the Convention more than it breaches the integrity of the Convention's principles. Moreover, it is possible that, over time, Egypt will be able to withdraw its reservation to Article 16 of the Women's Convention.

I. EGYPT AND THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

The Convention on the Elimination of All Forms of Discrimination Against Women is a comprehensive multilateral human rights agreement designed to achieve and enforce equal rights specifically for women. The discussion that follows provides the Convention's definition of discrimination against women, outlines the scope of application of the Convention's provisions, and summarizes the Convention's mechanisms for monitoring and enforcing compliance. In addition, it outlines Egypt's accession to the Women's Convention and summarizes Egypt's reservations to four provisions of the Convention.

2. For the definition of a reservation, *see infra* text accompanying note 34.

*A. The Convention on the Elimination of All Forms of
Discrimination Against Women*

The Convention on the Elimination of All Forms of Discrimination Against Women was unanimously adopted by the United Nations General Assembly on December 18, 1979, and entered into force on September 3, 1981.³ The Convention draws on several international agreements adopted in previous years to achieve women's rights and is the culmination of efforts by the U.N. Commission on the Status of Women, which was established in 1946.⁴ It also reflects the influence of the Convention on the Elimination of All Forms of Racial Discrimination (Racial Convention).⁵ As of June 1, 1991, 106 states had become parties to the Women's Convention.⁶

1. Definition of Discrimination and Scope of Application

Article 1 of the Women's Convention defines discrimination against women as:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁷

Articles 2 through 14 address specific areas of discrimination and suggest various types of remedial measures. These remedial measures include the introduction of legislation to end discrimination in the political, social, economic, and cultural spheres.⁸ Article 15 further requires parties to grant women equality in all civil legal matters, including administration of property, execution of contracts, and choice of residence.⁹

3. Women's Convention, *supra* note 1, at 13.

4. For a summary on the background, organization and provisions of the Convention, see generally Noreen Burrows, *The 1979 Convention on the Elimination of All Forms of Discrimination Against Women*, 32 NETH. INT'L. L. REV. 419 (1985) [hereinafter Burrows].

5. 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

6. See pamphlet cited *supra* note 1. The United States has not ratified the Convention.

7. Women's Convention, *supra* note 1, at 16.

8. *Id.* at 16-20.

9. *Id.* at 20.

Unlike the Racial Convention, the Women's Convention extends to discrimination beyond the public sphere and into the private domain. Article 16 provides for the elimination of discrimination against women in all family matters. Specifically, Article 16 addresses a woman's right to choose a spouse, to make decisions regarding her children, and to administer property on an equal basis with her husband.¹⁰

2. Enforcement and Monitoring of Compliance

Article 17 of the Convention provides for the establishment of a Committee on the Elimination of Discrimination Against Women (Committee), whose purpose is to monitor progress in the implementation of the Convention.¹¹ Article 18 requires each party to submit a report every four years to the U.N. Secretary-General for consideration by the Committee. In the report, parties must document their progress in implementing the Convention's provisions.¹² This reporting requirement provides the only means for monitoring compliance.¹³

Articles 19 through 22 outline the schedule of elections, meetings, and submissions of reports by the Committee.¹⁴ Article 23 provides that the Convention will not mitigate a party's obligation under another international instrument or domestic legislation that is "more condu-

10. *Id.*

11. *Id.* at 21.

12. *Id.* at 22. The full text of Article 18 reads:

1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect:

a. Within one year after the entry into force for the State concerned; and

b. Thereafter at least every four years and further whenever the Committee so requests.

2. Reports may indicate factors and difficulties affecting the degree of fulfillment of obligations under the present Convention.

Id.

13. Some commentators maintain that the Convention's implementation clauses are inadequate relative to those of other human rights conventions, and that its reporting guidelines are too general to elicit substantive compliance. See Burrows, *supra* note 4, at 457; see also Theodor Meron, Comment, *Enhancing the Effectiveness of the Prohibition of Discrimination Against Women*, 84 AM. J. INT'L L. 213 (1990); and Andrew C. Byrnes, *The "Other" Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women*, 14 YALE J. INT'L L. 1 (1989).

14. Women's Convention, *supra* note 1, at 22.

cive to the achievement of equality between men and women.”¹⁵ Article 24 obligates parties to “undertake to adopt all necessary measures” to implement the Convention.¹⁶ Articles 25 through 27 govern procedures for signature, ratification, entry into force, and requests for revision of the Convention.¹⁷

3. Provisions Permitting Reservations by Parties to the Convention

Under Article 28, a party wishing to submit a reservation must do so at the time it ratifies or accedes to the Women’s Convention. In addition, Article 28 prohibits reservations “incompatible with the object and purpose” of the Convention.¹⁸ Article 29, paragraph 1 enables parties who disagree with one another on the interpretation or application of the Convention to submit their dispute to arbitration or the International Court of Justice for resolution. Paragraph 2 of Article 29, however, permits parties to exempt themselves from this dispute resolution provision.¹⁹ Finally, Article 30 lists the signatories to the Convention and the languages in which the Convention is deposited with the U.N. Secretary-General.²⁰

B. Egypt's Accession to the Convention

Egypt signed the Women’s Convention in Copenhagen in 1980, during the World Conference of the U.N. Decade for Women, and the Egyptian Parliament ratified the Convention on September 18, 1981.²¹ Egypt made reservations to four separate provisions of the Women’s Convention. Like many other parties, Egypt made a reservation to Article 29, paragraph 1 of the Convention, consistent with the express provisions of paragraph 2 of that article.²² Egypt also made reservations to Articles 2, 9, and 16.

15. *Id.*

16. *Id.*

17. *Id.* at 22-23.

18. *Id.* at 23. For a summary of the “object and purpose” test of reservations (also called the “compatibility rule”), see *infra* text accompanying notes 37-41.

19. *Id.* at 23. This provision reflects the fact that many parties to the U.N. Charter do not recognize the compulsory jurisdiction of the International Court of Justice.

20. Women’s Convention, *supra* note 1, at 23.

21. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 1990, at 165 [hereinafter MULTILATERAL TREATIES].

22. Women’s Convention, *supra* note 1, at 23.

1. Egypt's Reservation to Article 2

Article 2 provides that parties to the Women's Convention shall generally combat discrimination by taking specific legislative action.²³ This provision delineates the means by which parties to the Convention obligate themselves to implement all other enforceable provisions of the Convention. Egypt's reservation to that article states: "The Arab Republic of Egypt is willing to comply with the content of this article, provided that such compliance does not run counter to the Islamic Sharia."²⁴ Thus Egypt agrees to adopt such anti-discriminatory legislation only to the extent that it is consistent with Islamic law.

2. Egypt's Reservation to Article 9

Article 9, paragraph 2 of the Convention provides, in full, that "States Parties shall grant women equal rights with men with respect to the nationality of their children."²⁵ The stated purpose of Egypt's reservation to that provision is:

23. *Id.* at 16. The full text of Article 2 provides:

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.

Id.

24. MULTILATERAL TREATIES, *supra* note 21, at 167. This sentence comprises the full text of Egypt's reservation.

25. Women's Convention, *supra* note 1, at 17.

to prevent a child's acquisition of two nationalities where his parents are of different nationalities, since this may be prejudicial to his future. It is clear that the child's acquisition of his father's nationality is the procedure most suitable for the child and that this does not infringe upon the principle of equality between men and women, since it is the custom for a woman to agree, on marrying an alien, that her children shall be of the father's nationality.²⁶

The reasoning behind this reservation is that Egyptian women voluntarily agree to relinquish the right bestowed upon them by Article 9 of the Women's Convention when they enter into marriage.

3. Egypt's Reservation to Article 16

Egypt has also made a reservation to Article 16 of the Convention. Article 16 provides that "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations"²⁷ This provision lists each mari-

26. MULTILATERAL TREATIES, *supra* note 21, at 167.

27. Women's Convention, *supra* note 1, at 20. The full text of Article 16 provides:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- (c) The same rights and responsibilities during marriage and at its dissolution;
- (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
- (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
- (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
- (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum

tal and family right separately and requires that parties grant women equality in each individual aspect of marital and family relations, including marriage, divorce, parenting, family planning, adoption, and ownership of property.

Egypt justifies its reservation to Article 16 by invoking "firm religious beliefs which govern marital relations in Egypt" and "ensure complementarity which guarantees true equality between the spouses."²⁸ Moreover, the reservation explains that because the Islamic dower system of marriage in Egypt favors women over men,²⁹ the woman's right to divorce is proportionately restricted. Thus, the Shari'a "restricts the wife's rights to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband."³⁰

Egypt's reservation to Article 16 implicitly rejects the Convention's segmented approach to the domain of marital and family rights in favor of treating those rights as one organic entity in which one type of right may be balanced against another. Moreover, Egypt's approach to Article 16 fails to acknowledge the presence of non-Muslim populations in Egypt, for whom Islamic family law does not apply.³¹

age for marriage and to make the registration of marriages in an official registry compulsory.

Id.

28. MULTILATERAL TREATIES, *supra* note 21, at 167. The full text of the reservation reads:

Reservation to the text of article 16 concerning the equality of men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution, without prejudice to the Islamic Sharia's provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them. This is out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt and which may not be called in [sic] question and in view of the fact that one of the most important bases of these relations is an equivalency of rights and duties so as to ensure complementarity which guarantees true equality between the spouses. The provisions of the Sharia lay down that the husband shall pay bridal money to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep. The Sharia therefore restricts the wife's rights to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband.

Id.

29. *See infra* note 52 and accompanying text.

30. MULTILATERAL TREATIES, *supra* note 21, at 167.

31. It is difficult to obtain information on exactly how many non-Muslims live in Egypt. One source states that about 90% of Egypt's population are Muslim, while

II. EGYPT'S RESERVATIONS IN THE FRAMEWORK OF INTERNATIONAL LAW

The permissibility of Egypt's reservations must be determined within the general framework of international law. The following discussion summarizes the general principles of international law that govern the permissibility of reservations to human rights conventions.

A. Permissibility of Reservations to Human Rights Conventions Under International Law: The Compatibility Rule

The Vienna Convention on the Law of Treaties (Vienna Convention)³² sets out the general norms that govern treaty interpretation, including the effect of reservations.³³ Article 2 of the Vienna Convention defines a reservation as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."³⁴ Article 19 generally permits States to make a reservation unless:

- a) the reservation is prohibited by the treaty;
- b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.³⁵

The Women's Convention specifically permits parties to make res-

most of the remaining 10% are Coptic Christian. *THE MIDDLE EAST AND NORTH AFRICA* 1991, at 406 (Europa Publications Limited, 37th ed., 1990). Another source states that 94% are Muslim, with the remaining 6% being Coptic Christian. *THE MIDDLE EAST* 140 (Congressional Quarterly, Inc., 7th ed., 1990) [hereinafter *MIDDLE EAST*].

32. 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter *Vienna Convention*].

33. Some commentators, however, have pointed to limitations in the scope and acceptance of the Vienna Convention. See, e.g., D. W. Bowett, *Reservations to Non-Restricted Multilateral Treaties*, 1977 *BRIT. Y.B. INT'L L.* 67, 88 [hereinafter *Bowett*]; Catherine Logan Piper, *Reservations to Multilateral Treaties: The Goal of Universality*, 71 *IOWA L. REV.* 295, 321 (1985).

34. *Vienna Convention*, *supra* note 32, at 333.

35. *Id.* at 336-37.

ervations to its arbitration provision.³⁶ This is consistent with Article 19(b) of the Vienna Convention. The Women's Convention also contains an "object and purpose" provision that is similar to Article 19(c) of the Vienna Convention.³⁷ That provision embodies the "compatibility rule," which was first articulated in 1951 in an opinion by the International Court of Justice (I.C.J.) on reservations to the Convention on Genocide (Genocide Convention).³⁸

The compatibility rule was developed by the I.C.J. to reconcile two conflicting views on the acceptability of reservations to multilateral conventions. One view considers universal adoption of a convention to be its primary goal while the other regards upholding the integrity of a convention's principles to be its most important objective. According to the I.C.J., proponents of the universality approach to reservations maintain that any State entitled to become a party to a convention "may do so while making any reservation it chooses by virtue of its sovereignty."³⁹ Proponents of the integrity approach, on the other hand, argue that the "express or tacit assent [to a reservation] of all the contracting parties" is necessary to the acceptance of that reservation.⁴⁰ The I.C.J. introduced the compatibility rule to promote universal adoption of the Genocide Convention while preserving the integrity of its fundamental principles.⁴¹

36. See *supra* note 19 and accompanying text.

37. See *supra* note 18 and accompanying text. For background on the debate in the UN regarding the application of the approach of the Vienna Convention to reservations to the Women's Convention, see generally Belinda Clark, *The Vienna Convention Reservations Regime and The Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 281 (1991).

38. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15 (May 28). The compatibility rule provided the catalyst for Article 19(c) of the Vienna Convention and holds that a reservation must be compatible with the object and purpose of a convention to be permissible. *Id.* at 24. See *infra* note 41 for text from the I.C.J. opinion defining the compatibility rule.

39. *Id.* at 24.

40. *Id.*

41. The I.C.J. stated:

The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis. It is inconceivable that the contracting parties readily contemplated that an objection to a minor reservation should produce such a result. But even less could the contracting parties have intended to sacrifice the very object of the Convention in favour of a vain desire to secure as many participants as possible. The object and purpose of the

The compatibility rule appears to be a reasonable compromise for determining the permissibility of reservations to a convention. However, in the absence of an authoritative mechanism for assessing the compatibility of a specific reservation with the object and purpose of an agreement, the rule provides little guidance. Consequently, the State that enters a reservation is, in effect, the party that decides whether it is compatible with the object and purpose of a convention. Other States may object to the reservation on grounds that it is inconsistent with a convention's object and purpose, but in many multilateral human rights agreements, such objections have little practical consequence.⁴²

Like most multilateral agreements, the Women's Convention does not provide a specific definition of its object and purpose in its text. However, it does provide a general definition of its object and purpose in its title. As the title expressly states, the Convention is dedicated to "the elimination of all forms of discrimination against women." Moreover, the Convention's provisions define what constitutes such discrimination⁴³ and delineate the means that parties must undertake to eliminate such discrimination. Those provisions are discussed at greater length below in the analysis of Egypt's reservations to the Women's Convention.

Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation.

Id.

42. *See, e.g., supra* note 19 and accompanying text. It is important, however, to note the distinction between "permissibility" and "opposability" of a reservation. The issue of permissibility:

must be resolved by reference to the treaty and is essentially an issue of treaty interpretation; it has nothing to do with the question of whether, as a matter of policy, other Parties find the reservation acceptable or not. . . the issue of 'opposability' is the secondary issue and pre-supposes that the reservation is permissible. Whether a Party chooses to accept the reservation, or object to the reservation, or object to both the reservation and the entry into force of the treaty as between the reserving and the objecting State, is a matter for a policy decision and, as such, not subject to the criteria governing permissibility and not subject to judicial review.

Bowett, *supra* note 33, at 88.

43. *See supra* text accompanying note 7 for the definition of discrimination against women.

*B. The Permissibility of Egypt's Reservations
Under International Law*

Egypt's reservations to Articles 2 and 9 of the Women's Convention are inconsistent with basic principles of international law. Both reservations compromise the integrity of the Convention more than they promote its universal adoption and are therefore incompatible with the object and purpose of the Convention.

1. Egypt's Reservation to Article 2

As noted previously, Article 2 sets out the means by which parties must implement provisions of the Women's Convention into their domestic law.⁴⁴ Thus, Article 2 is the central provision giving actual force to the object and purpose of the Convention. As one commentator has noted, a reservation to Article 2 that excludes the establishment of the means to move towards the Convention's ultimate goals "obstructs and compromises compliance with the object and purpose of the Convention."⁴⁵

Egypt's reservation to Article 2 is based on religion.⁴⁶ However, Egypt has failed to provide any explanation for this general reservation.⁴⁷ Under the compatibility rule, such a broad reservation to the central provision of the Women's Convention appears to frustrate the Convention's primary purpose of eliminating discrimination against women at the domestic level.⁴⁸ Therefore, Egypt's reservation to Article 2 is impermissible because it violates the integrity of the Convention more than it advances universal adoption of the Convention. The argument that permitting Egypt to make its reservation to Article 2 may be the only way to elicit Egypt's adoption of the Convention carries little force because Article 2 is the most important provision of the Convention. Egypt's broad reservation to Article 2 is therefore incompatible

44. See *supra* note 23 for the full text of Article 2.

45. See Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643, 689 (1990) [hereinafter Cook].

46. See *supra* note 24 and accompanying text.

47. *Id.*

48. Rebecca Cook observes that "because the [1979] Convention is a human rights instrument of transcending significance, a state party's intention to adhere [to it] may be taken to prevail over any derogation founded on a vaguely worded reservation," such as Egypt's reservation to Article 2. Moreover, generally worded reservations such as Egypt's "may be construed not to permit the [reserving] state to claim a legal justification for its refusal or failure to respect the fundamental goal of the Convention to which the state claims to be a party." Cook, *supra* note 45, at 691-92.

with the object and purpose of the Women's Convention.

Because Article 2 applies to the means of implementing each provision of the Convention, it is not necessary for a party to make a general reservation to that provision in order to exempt itself from separate provisions in the agreement. It is possible, therefore, for Egypt to withdraw its general reservation to Article 2 and retain its reservations to individual provisions, to the extent that those reservations are separately permissible under international law.

2. Egypt's Reservation to Article 9

Egypt's reservation to Article 9 of the Women's Convention is also impermissible under international law. While the reservation to Article 9 is more detailed than the reservation to Article 2, the former fails to invoke any distinguishable religious or legal justification. Egypt merely states that "it is clear" that the nationality of the father is more suitable for the child than that of the mother and that "it is custom" for a woman who marries an alien to agree to this.⁴⁹ This reservation is based on the proposition that Egyptian women voluntarily abdicate their right of equality with men with respect to the nationality of their children when they enter into marriage.

The reservation is impermissible because it fails to provide any substantive explanation for its purported inability to grant women the fundamental right, provided by the Women's Convention, of equality with respect to the nationality of their children. A reservation which has the effect of denying women such a fundamental right compromises the integrity of the Convention. Neither the wording nor the tone of Egypt's reservation to Article 9 suggest that Egypt would be unable to maintain its adoption of the Convention if it were to withdraw the reservation. To whatever extent the universal application of the Convention is advanced by Egypt's reservation to Article 9, such advancement is outweighed by the violation of the integrity of the Convention the reservation represents.

3. Egypt's Reservation to Article 16

In contrast with its other reservations, Egypt supports its reservation to Article 16 by outlining the "equivalency" and "complementarity" of rights and duties of husband and wife provided by Shari'a.⁵⁰ In making this reservation, Egypt appears to rely on Article 23 of the

49. For the full text of the reservation, see *supra* text accompanying note 26.

50. See *supra* notes 28-30 and accompanying text.

Convention, which protects domestic legislation of a party that is more conducive to sexual equality than the provisions of the Women's Convention. Whether provisions of Egyptian family law relevant to this reservation are indeed more conducive to sexual equality underlies the analysis in Part V of this comment, which examines the compatibility of Egypt's reservation to Article 16 with the object and purpose of the Women's Convention. First, however, it is necessary to establish the legal and political contexts which gave impetus to this reservation.

III. EGYPT'S RESERVATION TO ARTICLE 16 IN THE CONTEXT OF ISLAMIC AND EGYPTIAN LAW

Egyptian jurists and scholars played a crucial role in the general development of Islamic jurisprudence and in the interpretation and reformulation of the marital and family rights of Muslim women throughout the Arab world. The discussion that follows briefly reviews the historical role Islam has played in granting women marital and family rights. The discussion outlines the four primary sources of Islamic law as well as the four principal schools of Islamic law. With that background, the section concludes by tracing the development of personal status law in Egypt.

A. Sources of Islamic Law

Historically, Islam improved the lives of Arab women by guaranteeing certain rights and privileges not otherwise recognized in the traditional pre-Islamic cultures of the Arab Middle East. In pre-Islamic Arabia, women were "sold" by their families to their husbands, had no say in the initiation or termination of their marriage, and lost all family inheritance rights upon marriage. Moreover, men were entitled to marry as many wives as they chose.⁵¹

With the introduction of Islam, a husband was required to give money directly to his wife, rather than to her family, in consideration for the marriage.⁵² Moreover, women no longer lost their rights to family property upon marriage. Islam also accorded women the right to have a say in determining the contractual provisions of their marriage. In addition, Islam restricted the right of men to initiate and terminate marriage, although it did not entirely negate male dominance in the

51. JOHN L. ESPOSITO, *WOMEN IN MUSLIM FAMILY LAW* 20 (1982) [hereinafter ESPOSITO].

52. The *Qur'an* prescribes, "And give unto the women, (whom ye marry) free gift of their marriage portions." *THE MEANING OF THE GLORIOUS QUR'AN* IV:4 (Marmaduke Pickthall, trans., 1983 ed.) [hereinafter *QUR'AN*].

area of marital relations.⁵³ Finally, while the introduction of Islam did not eliminate the pre-Islamic practice of polygamy, it imposed significant restrictions on that practice. In Islam, a man is entitled to marry up to four wives. However, that right is limited by the proviso that he treat all his wives equally.⁵⁴

1. *Qur'an* and *Sunna*: The Divine Revelations

There are four primary sources of Islamic law: the *Qur'an*, the *Sunna*, *Qiyas*, and *Ijma*.⁵⁵ The first two sources, the *Qur'an* and the *Sunna*, are considered to be the divine revelations of God. The *Qur'an* consists of a compilation of moral prescriptions. The *Sunna* consists of the deeds and sayings of the Prophet Muhammad, recorded in what are known as the *Hadith*.⁵⁶

The first 150 years of Islam were characterized by an "almost untrammelled freedom of juristic reasoning" in the solution of problems not specifically addressed by divine revelation.⁵⁷ Thus, when new circumstances posed new problems, they were answered on a case by case basis by individual judges and jurists.⁵⁸ Gradually, however, a rift developed between those who believed that the *Qur'an* and the *Sunna* must be the direct source of every law, and those who believed in the legitimacy and necessity of human reasoning to interpret those sources and formulate laws.⁵⁹

2. *Qiyas*: Reasoning by Analogy

To resolve this conflict, in the early ninth century, Shafi'i, a jurist now generally regarded as the father of Islamic jurisprudence, developed what came to be accepted as a third source of Islamic law — *Qiyas*, or reasoning by analogy from the *Qur'an* and the *Sunna*.⁶⁰ Pre-

53. See, e.g., *infra* note 84 and accompanying text.

54. This right and qualification are attributed to the following verse of the *Qur'an*:
And if ye fear that ye will not deal fairly by the orphans, marry of the women, who seem good to you, two or three or four; and if ye fear that ye cannot do justice (to so many) then one (only) or (the captives) that your right hands possess. Thus it is more likely that ye will not do injustice.

QUR'AN IV:3; see also QUR'AN IV:129.

55. See ESPOSITO, *supra* note 51, at 3-8.

56. *Id.* See also NOEL J. COULSON, CONFLICTS AND TENSIONS IN ISLAMIC JURISPRUDENCE 4 (1969) [hereinafter COULSON].

57. COULSON, *supra* note 56, at 4.

58. *Id.*

59. *Id.* at 5.

60. *Id.* at 6.

viously, divine revelation and human reasoning were treated separately by Islamic scholars. Henceforward, divine revelation and human reasoning became intertwined in Islamic jurisprudence, although human reasoning remained subordinate in authority to the actual sources of divine revelation.

3. *Ijma*: Consensus

In addition to establishing *Qiyas*, Shafi'i founded a "school" of Islamic law that bears his name. The other major schools of Islamic law, also named after the jurists who founded them, are the Hanafi, Maliki, and Hanbali schools.⁶¹ Although these four schools ultimately diverged in methods of interpretation and other matters, by the end of the ninth century, they "mutually regarded their several bodies of doctrine as equally legitimate attempts to define Allah's law, equally authoritative versions of the Shari'a."⁶² Thus was born the fourth source of Islamic law, *Ijma*, or consensus. *Ijma* is the "unanimous agreement of the jurists of a particular age on a specific issue."⁶³

4. The Closing of the Gate of *Ijtihad*

Both *Qiyas* and *Ijma* are forms of *Ijtihad*, or individual reasoning.⁶⁴ In the early tenth century, Islamic jurists declared that, where consensus had been reached, the "gate" of *Ijtihad* was closed. The teachings of the great jurists were deemed complete and further independent interpretation was considered unnecessary.⁶⁵ The practice of *Taqlid*, or adhering superficially to one of the traditional schools of law, took the place of *Ijtihad*. The gate of *Ijtihad* remained closed un-

61. *Id.* at 21. All of these schools are within the Sunni community. The vast majority of Muslims in Egypt are Sunni.

62. *Id.* at 22.

63. ESPOSITO, *supra* note 51, at 7.

64. JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 37 (1964) [hereinafter SCHACHT].

65. Esposito and other scholars attribute this stasis in jurisprudence largely to the Mongol invasions and other political factors. ESPOSITO, *supra* note 51, at 10-11. However, Coulson has called such theories "fanciful" and "unnecessary," observing that "Islamic society itself remained relatively static throughout this time" and attributing the stagnation instead to an internal lack of "social impetus to challenge the authority of the medieval legal manuals" COULSON, *supra* note 56, at 44.

But see ALBERT HOURANI, A HISTORY OF THE ARAB PEOPLES 160 (1991) [hereinafter HOURANI]. Hourani argues that there is no definitive evidence that the precept of the closing of the gate of *Ijtihad* was ever truly formulated or generally accepted. He asserts that *Ijtihad* was in fact carried on within each school and by individual judges.

til the early twentieth century.

B. *Personal Status Law in Egypt*

During the mid-nineteenth century, the Arab world found itself increasingly exposed to European culture and influence. Egypt was part of the Ottoman Empire, which promulgated commercial and penal codes modeled on European laws. Although it achieved independence from the Ottomans in 1874, Egypt enacted civil and criminal codes modeled on French law. Throughout these developments, however, the family law of Egypt remained within the exclusive purview of Islamic law.⁶⁶

In 1875, under official sponsorship, an Egyptian jurist named Muhammad Qadri Pasha compiled a family and inheritance legal code based on the Hanafi school of law.⁶⁷ Although never officially adopted, that code would greatly influence the administration of Shari'a in Egypt and other parts of the Middle East by the turn of the century.⁶⁸ Family law in Egypt did not undergo significant reform until the 1920's. But from that time forward, Egyptian jurisprudence and legislation gave impetus to modernist legislation throughout the Arab world.⁶⁹

The Shari'a had always required that a husband maintain his wife by providing her with food, clothing, and shelter. In return, the wife was obligated to obey her husband and accord him conjugal rights. Under all four Islamic schools of law, the wife had the right to sue for maintenance if her husband refused to provide it. However, under Hanafi law, that right became meaningless, because the wife had no right to recover maintenance that was past due. Moreover, in contrast with Maliki and Shafi'i law, Hanafi law prohibited a woman from divorcing her husband based on his neglect, inability, or refusal to maintain her.⁷⁰

66. See ESPOSITO, *supra* note 51, at 49.

67. *Id.* See also SCHACHT, *supra* note 64, at 100. The Ottomans established the Hanafi school as the official school of the Ottoman Empire in the sixteenth century. Prior to that, most Egyptians followed the Shafi'i school. The Hanafi school continues to govern Egyptian family law and judicial proceedings. See ESPOSITO, *supra* note 51, at 137 n.2.

68. ESPOSITO, *supra* note 51, at 50; see also SCHACHT, *supra* note 64, at 101.

69. ESPOSITO, *supra* note 51, at 51-52.

70. *Id.* at 27.

1. Law No. 25: The First Personal Status Law

In 1929, Egypt enacted Law No. 25 by royal decree. That law recognized, for the first time, four grounds on which a woman could sue her husband for divorce: (1) failure to provide maintenance, (2) dangerous or contagious disease, (3) desertion, and (4) mistreatment.⁷¹ Law No. 25 rejected the traditional Hanafi limitations on a woman's marital rights by enabling her to recover past maintenance and permitting her to sue for divorce in cases where her husband had failed to provide maintenance.

Law No. 25 introduced further reform by limiting the husband's unilateral right under Hanafi law to divorce his wife at any time and for any reason.⁷² Previously, the husband's simple utterance, "I divorce thee," terminated the marriage, regardless of his intention. Consequently, a pronouncement made in jest, drunkenness, or under compulsion was given legal force. The divorce was also treated as valid regardless of whether the wife had been informed or consulted. Under the Hanafi law, if the husband made the pronouncement fewer than three times, the divorce was revocable. However, if he uttered the words three times, the divorce became irrevocable.⁷³

Law No. 25 signaled a shift away from an emphasis on form in the Hanafi school towards one on intention in the Maliki and Shafi'i schools. For example, under Law No. 25, a husband's pronouncement made in jest, drunkenness, or under compulsion was presumed to lack true intent and was rendered invalid.⁷⁴ Moreover, Law No. 25 made any divorce resulting from the husband's pronouncement revocable, regardless of the number of times uttered.⁷⁵

71. *Id.* at 53-54. Under the Hanafi school, which is the most rigid in the area of family law, a woman could divorce her husband only if the husband was impotent or if the marriage had been fraudulently arranged for the woman when she was a child. She could exercise this option only upon reaching puberty.

72. *Id.* at 58. Esposito notes that "the Qur'anic injunctions regarding just and equitable treatment of wives had been morally but not legally binding." *Id.*

73. *Id.* at 30-33. This latter form of repudiation, when it consists of three pronouncements in a row at the same time, is generally considered to be contrary to the teachings of Muhammad. A permissible form of irrevocable divorce is effected by three pronouncements which are made at different times. In either case, the divorced spouses may only remarry one another if the woman marries another man, consummates that marriage and then legally divorces her new husband. *Id.* at 32.

74. *Id.* at 58.

75. *Id.* at 59.

2. Law No. 44: Jihan's Law

Although Law No. 25 effected many improvements in the legal rights of Egyptian women, it did not address all areas of marriage and divorce law which were considered to be in need of reform.⁷⁶ During the next few decades, cabinet ministers and specially appointed committees submitted recommendations and drafted legislation for additional reforms, but no further legislation was actually enacted until 1979.⁷⁷ In June of that year, to avoid further resistance against family law reform, President Anwar Sadat enacted Law No. 44 by presidential decree.⁷⁸ Sadat issued that law while Parliament was in recess, six months before the UN General Assembly adopted the Women's Convention.⁷⁹

Popularly known as "Jihan's Law," after Sadat's wife, Law No. 44 required a husband to obtain a notarized certificate of divorce and gave a wife the right to be informed if her husband divorced her or if he planned to marry an additional wife. It also gave a wife the right to divorce her husband if a subsequent marriage harmed her or if he failed to inform her of that marriage.⁸⁰ The law invoked Maliki and Hanbali jurisprudence in granting a woman the right to divorce her husband if she disapproved of a subsequent marriage.⁸¹ Although many orthodox Muslim jurists opposed Law No. 44, there were many other religious figures, including several shaikhs from Al-Azhar University, who approved some of its provisions.⁸²

In addition to these reforms, Law No. 44 granted a divorced wo-

76. *Id.* In 1926, a government appointed committee submitted draft articles to be integrated into Law No. 25 which recommended (1) that a woman be permitted to include certain stipulations in her marriage contract, such as a provision prohibiting her husband from marrying a second wife; (2) that a man be required to obtain permission from a judge to marry more than one wife before the marriage could be registered; and (3) that before granting such permission, a judge be required to investigate the man's ability to treat all or both of his wives equally. Although the Egyptian Cabinet approved these draft articles, they were not incorporated into Law No. 25 due to their controversial nature. *Id.* at 59-60.

77. *Id.* at 59-61.

78. *Id.* at 61-62.

79. *See supra* text accompanying note 3.

80. ESPOSITO, *supra* note 51, at 61; *see also* Amany Kamal Eldin et al., *After Jihan's Law: A New Battle Over Women's Rights*, THE MIDDLE EAST, June 1985, at 17, 20 [hereinafter Eldin].

81. ESPOSITO, *supra* note 51, at 61.

82. *See* Eldin, *supra* note 80, at 20. Located in Cairo, Al-Azhar University is considered one of the greatest learning centers of Islamic religion and law in the Muslim world.

man with children the right to remain in her marital home until she remarried or lost custody of her children. That right has particular significance in Egypt, where housing is in short supply. The law also expanded a woman's entitlement to maintenance by her ex-husband following divorce, extended the age at which children of divorced parents are automatically returned to their father's custody, and gave a wife who left her husband the right to appeal to the courts against any attempt by her husband to have her forcibly returned.⁸³ Despite these and other reforms accomplished by Law No. 44, the husband retained the right to practice polygamy and to obtain a divorce without judicial approval.⁸⁴

3. Law No. 100: The Current Personal Status Law

On May 4, 1985, the Supreme Court of Egypt struck down Law No. 44 as unconstitutional, holding that the enactment of a personal status law did not fall within Sadat's powers to enact presidential decrees, which are limited to "emergency" situations.⁸⁵ This repeal caused widespread opposition and inspired organized groups of women to lobby the Egyptian Parliament to reenact the law. Three weeks later, Law No. 100 was passed.⁸⁶

Law No. 100 largely resembles Law No. 44, with some changes. Moving one step backward, the law provides that a judge, rather than the woman herself, decides whether she has been harmed by her husband's second marriage before she may invoke the marriage as grounds for divorce. Moving a step forward, however, unlike Law No. 44, the new law provides penalties to aid in the enforcement of its provisions.⁸⁷ Law No. 100 remains effective today as the legislative basis for the marital rights of Egyptian women.

83. *Id.* at 19.

84. ESPOSITO, *supra* note 51, at 63.

85. NADIA HIJAB, *WOMANPOWER: THE ARAB DEBATE ON WOMEN AT WORK* 31 (1988) [hereinafter HIJAB]. Sadat was assassinated in 1981 and was succeeded by Hosni Mubarak. David B. Ottaway, *Mubarak Becomes Egypt's President, Pledges to Follow Policies of Sadat*, WASHINGTON POST, Oct. 15, 1981, at A1. As of the writing of this comment, Mubarak continues to hold the presidency.

86. HIJAB, *supra* note 85, at 35. Law No. 100 is available in Arabic in the Library of Congress, Near Eastern Law Division, or in the *Official Gazette* of Egypt, No. 27T, July 4, 1985, at 4-11.

87. HIJAB, *supra* note 85, at 35.

IV. THE SOCIAL AND POLITICAL CONTEXT OF EGYPT'S RESERVATION TO ARTICLE 16

It is not possible to appreciate the influence of Islamic law in modern Egypt without considering the social and political climate in which Islamic and Egyptian jurisprudence developed during the nineteenth and twentieth centuries. One scholar observes that "Islam, by its own showing, is a unity in which culture, society, and the political realm, no less than devotion and cultic forms, partake. It is, for Muslims, a western and deplorable notion to think of religion as separable from the totality of the human context."⁸⁸

Consistent with this description of Islam, Arab nationalism, in which Egypt played an important role, influenced the course of Islamic jurisprudence. In turn, Islamic jurisprudence continues to determine the legal rights of Egyptian women in the family domain. As discussed below, three figures in Egyptian history — Muhammad Abduh, Gamal Abdel Nasser, and Anwar Sadat — greatly altered religious, political, and social thought in Egypt. Those transformations in thought informed the history of Egypt's personal status law.

A. Contact with Europe and the Development of Arab Nationalism

By the early nineteenth century the Arab world had been deeply affected by its contact with Europe. In many areas of enterprise, including government and law, western ideas and institutions were incorporated into the dominant culture and institutions of the Arab Middle East.

Napoleon invaded Egypt in 1798, and French troops remained there until 1801. During most of the nineteenth century, Egypt was ruled by the dynasty of Muhammad Ali and his successors, who continued the processes of westernization. The British occupied Egypt in 1882, thirteen years after the opening of the Suez Canal. The Suez provided, for the first time, a short route between England and its imperial possessions in Asia. Although the British occupation formally concluded in 1914, Egypt remained a British protectorate until 1922, when it returned to self-ruled monarchy under King Fu'ad.⁸⁹

By the turn of the century, many Muslims reacted against the forces of westernization and clung fiercely to *Taqlid*. As the Islamic historian M.G.S. Hodgson observes: "[T]aqlid finally came . . . to in-

88. KENNETH CRAGG, *THE HOUSE OF ISLAM* 1 (2d ed. 1975).

89. See MIDDLE EAST, *supra* note 31, at 142. King Fu'ad ruled until 1936, when he was succeeded by King Faruq.

clude a conscious rejection of all the new and culturally alien ways of the Occident."⁹⁰ However, some Arab intellectuals, particularly in Egypt, believed that their societies had no choice but to address the influences flowing from the West into their cultures and institutions. It was time, they argued, to reject *Taqlid*. But while some preferred to reject *Taqlid* by wholeheartedly embracing western ways and turning away from Islamic tradition, others called for reopening the gate of *Ijtihad*.⁹¹

One of the leading figures of the movement for legal reform was Muhammad Abduh, a jurist who studied and taught at Al-Azhar and later became known as the "Father of Muslim Modernism."⁹² Abduh is described as having believed that "Muslims must do once more what they should always have done: that is to say, reinterpret their law and adapt it to modern problems."⁹³ Those modern problems extended, in his view, to family law and the legal status of women.

1. Muhammad Abduh and Islamic Modernism

Muhammad Abduh harshly criticized the practice of polygamy, contending that, because it is virtually impossible to treat all wives with equal justice and impartiality as the *Qur'an* requires, the *Qur'an* actually calls for monogamy.⁹⁴ Abduh's view, however, did not translate into actual legislative reforms in Egypt until the 1920's. Beginning with Abduh, Egypt became the hotbed of modernist jurisprudence and the modernist legislative movement.⁹⁵ The reformist ideas of Abduh and his followers were central to the reforms enacted under Law No. 25 of 1929.⁹⁶

In the fifty years that separated the enactment of Law No. 25 and Law No. 44, Egypt underwent several major political transformations. During the reign of King Faruq, between 1936 and 1952, one of the most important battles of World War II was fought on Egyptian soil, Palestine was partitioned, and the state of Israel was born in the face

90. 3 MARSHALL G.S. HODGSON, *THE VENTURE OF ISLAM: CONSCIENCE AND HISTORY IN A WORLD CIVILIZATION* 274 (1974) [hereinafter HODGSON].

91. *Id.* at 274-75; see also ALBERT HOURANI, *ARABIC THOUGHT IN THE LIBERAL AGE, 1798-1939* (Cambridge U. Press, 1983)(1962) [hereinafter HOURANI, *ARABIC THOUGHT*].

92. ESPOSITO, *supra* note 51, at 50.

93. HOURANI, *ARABIC THOUGHT*, *supra* note 91, at 151.

94. ESPOSITO, *supra* note 51, at 51.

95. SCHACHT, *supra* note 64, at 103.

96. *Id.* See also NORMAN ANDERSON, *LAW REFORM IN THE MUSLIM WORLD* 62 (1976).

of bitter opposition by Egypt.⁹⁷ In 1952, King Faruq was overthrown by nationalist dissident army officers led by Gamal Abdel Nasser.⁹⁸ Nasser became President of Egypt in 1954 and remained in that position until his death in 1970.⁹⁹

2. Nasser and Secular Arab Nationalism

Nasser attempted to institute a secular, socialist form of government in Egypt, and made overtures to other Arab nations to form a united Arab republic with Egypt. A few years after Nasser assumed power, women were granted civil and political rights. In deference to the continued influence of Islam as a political force in Egypt, however, Nasser did not attempt to reform personal status law.¹⁰⁰ In 1957, Nasser ordered that the religious courts, both Muslim and non-Muslim, be incorporated into the National Courts of Egypt.¹⁰¹ In toppling the monarchy, Nasser had allied himself with the Muslim Brotherhood, a group which called for the return to a pan-Arab Islamic nation.¹⁰² However, shortly after Nasser came to power, he viewed the Brotherhood as a threat to his regime and suppressed their activities in Egypt.¹⁰³

The increasing force of Arab nationalism promoted by Nasser was based, in part, on the rejection of Western political and economic influence. When, in 1955, the Western Allies turned to Egypt's chief rival, Iraq, to negotiate an assistance agreement which later became known as the Baghdad Pact, Egypt responded by signing an arms agreement with Czechoslovakia and mutual defense treaties with the Arab nations that opposed Iraq.¹⁰⁴ Egypt also granted recognition to Communist China.¹⁰⁵ Furthermore, in 1956, in the context of acrimonious negotiations with the United States and Great Britain concerning prospective

97. MIDDLE EAST, *supra* note 31, at 142.

98. *Id.*

99. *Id.*

100. HIJAB, *supra* note 85, at 29.

101. *Id.* at 30.

102. HODGSON, *supra* note 90, at 392.

103. FOUAD AJAMI, THE ARAB PREDICAMENT: ARAB POLITICAL THOUGHT AND PRACTICE SINCE 1967, at 119 (1981) [hereinafter AJAMI]. The author observes:

Thus, the importance of Muslim fundamentalism is not measured best in terms of its capacity to *capture* political power. Its power may lie in its ability to destabilize a regime, to help bring it down by denying it the religious cover that remains an important source of political power.

Id. (emphasis added).

104. MIDDLE EAST, *supra* note 31, at 142.

105. *Id.* at 139.

western aid for construction of the Aswan Dam, Nasser nationalized the Suez Canal. These events led also to Israel's invasion of the Suez during the same year. As tensions between Egypt and the West mounted, Egypt increasingly aligned itself with the Soviet Union for support.¹⁰⁶

Nasser's attempts to socialize Egypt and promote Arab unity held the attention not only of Egyptians, but also of Arabs throughout the Middle East and North Africa for more than a decade. The defeat of the Arabs by Israel in the 1967 War (Six Day War), however, had devastating consequences for Egypt. As Fouad Ajami has observed:

The outcome of the Six Day War was a textbook case of a revolutionary situation, with all its standard ingredients: military defeat, internal exhaustion, the disaffection of intellectuals, a generation gap that was rapidly turning into an abyss, scathing critiques of the most sacred facets of a culture's life.¹⁰⁷

In this context, there was a general religious revival in Egypt which some have characterized as a direct response by Egyptians to the Six Day War.¹⁰⁸ Nasser appears to have overlooked the significance of this religious revival. Like Muhammad Abduh, Nasser believed that a program of social reform would provide the most effective means of revitalizing his nation.¹⁰⁹ However, unlike Abduh, Nasser chose to base social reform on principles of secular nationalism and socialism rather than Islam. That choice resulted in the stagnation of family law and women's marital rights.

B. Egypt's Retreat from the Principles of Arab Nationalism

Nasser's death in 1970 occurred before Egypt had fully recovered from its defeat in the Six Day War. He was succeeded in the Egyptian presidency by Anwar Sadat, who soon turned Egypt away from Arab Socialism and dependence on the Soviet Union.¹¹⁰ Gradually, Sadat reopened ties with the West in an effort to attract western capital and revitalize the Egyptian economy, which had been in decline during Nasser's tenure in office.

106. *Id.* at 143.

107. AJAMI, *supra* note 103, at 141-42.

108. See, e.g., Fadwa El Guindi, *Veiling Infitah with Muslim Ethic: Egypt's Contemporary Islamic Movement*, 28 SOCIAL PROBLEMS 465, 468 (1981) [hereinafter El Guindi].

109. *Id.* at 142.

110. MIDDLE EAST, *supra* note 31, at 144.

Egypt's successful surprise attack on Israel in October, 1973 (1973 War) dramatically changed the social and political climate in Egypt. The 1973 War restored popular morale and economic promise in Egypt. Moreover, it marked the beginning of an "Islamic Movement" in Egypt. Unlike the general religious revival of 1967, this movement was not a direct result of war.¹¹¹ However, the Egyptian victory over Israel "was the point at which Islam effectively and formally affirmed its legitimacy for the people. Its relevance was dramatically demonstrated by the victory."¹¹²

Ultimately, the 1973 War and the Arab oil embargo against the United States resulted in negotiations with the United States that led to the Camp David Accords in 1978, which established peaceful relations between Egypt and Israel.¹¹³ Once Sadat was confident his own people were convinced that Egypt had signaled to the West that it could not be bullied, he could request Western assistance without compromising his nation's integrity.

1. Reform of Family Law Under Sadat

Sadat, in retrospect, underestimated the vitality of traditional Islamic identity in Egypt and the antagonism felt by the Egyptian people toward the West. His closeness with the United States and the "separate peace" he entered with Israel alienated Egyptians and outraged the other Arab states. During Sadat's presidency, the Muslim Brotherhood reemerged as a powerful group dedicated to establishing a traditional Islamic society in Egypt.¹¹⁴ Simultaneously, young Egyptian women started their own Islamic movement, which manifested itself in a return to the veil and traditional clothing. Eventually, these two groups merged.¹¹⁵

The veil worn by Egyptian women of the contemporary Islamic movement was not the same veil as the one cast off by their grandmothers during the reformist movement of the 1920's. In contrast to the old veil, the new veil was "sociologically egalitarian, erasing any social or economic differences among its wearers or in their family background."¹¹⁶ Moreover, while the wealthy, urban "feminists" of

111. El Guindi, *supra* note 108, at 468.

112. *Id.* at 481.

113. *See generally* MIDDLE EAST, *supra* note 31, at 24-32, 144.

114. In 1981, members of a group which was an offshoot of the Muslim Brotherhood assassinated Sadat. *See* HOURANI, *supra* note 65, at 446. *See also supra* note 85.

115. El Guindi, *supra* note 108, at 481.

116. *Id.* at 476.

1923 rejected their veils in an attempt to emancipate themselves from societal exclusion, the Islamic women of the contemporary movement embraced their veils to emancipate themselves from "immodesty, exposure and inequality."¹¹⁷

When women were restricted to the private domain, the veil was unnecessary. However, as the number of women enrolling in universities and entering professional fields during the 1970's and 1980's increased exponentially, many women began asserting their right to move about in the public sphere as equals by donning plain, traditional clothing.¹¹⁸ Some Egyptian women wore the veil to signify their rejection of Western influence. For others, the veil became a symbol of an ordered life during turbulent times.¹¹⁹

In this climate of Islamic resurgence, Sadat enacted Law No. 44 of 1979 (Jihan's Law) by unilateral presidential decree, only months before the U.N. General Assembly adopted the Women's Convention. The timing of that decree suggests that his motives extended beyond the improvement of women's status. It appears that Sadat enacted this law, in part, to reinforce his image in the West as the most progressive leader in the Arab world.

Women activists in Egypt received Jihan's Law with ambivalence. On the one hand, they opposed it based on its association with Sadat who, in their minds, had betrayed the Arab world by making peace with Israel and opening Egypt's economy to Western dominance.¹²⁰ At

117. *Id.*

118. El-Guindi explains the return to the veil in this way:

It is common, and has almost become tradition in Egypt, that men harass women in public by the most demeaning and undignified words, gestures and touching. Because men define the public world (not including the workplace) as their space, women are treated as intruders. And while women are being physically harassed, they are also accused of bringing it upon themselves by being there.

Therefore, a woman in public has a choice between being secular, modern, feminine and frustratingly passive (hence very vulnerable), or becoming a *mitdayyinan* (religieuse), hence formidable, untouchable and silently threatening. The young women who are now in public, and because of social change will remain there, made the choice and it became a movement.

Id. at 481.

119. Angela Davis, *A Veiled Hint of Hell*, NEW INTERNATIONALIST, July 1985, at 21.

120. In contrast with this portrayal of Sadat, El Guindi described him in 1981 as "projecting the image of the traditional leader, epitomized in the classic figure of the Egyptian 'umda (village head)." El Guindi, *supra* note 108, at 478. His wife, on the other hand:

projects the image of the modern elite woman: westernized, educated, capital-

the same time, they welcomed the improvements in women's rights that it provided.¹²¹

2. The Rejection of Sadat's Reforms

When the Egyptian Supreme Court struck down Jihan's Law as unconstitutional in 1985, Egyptian women activists again reacted with ambivalence. On the one hand, they supported the rejection of Sadat's abuse of presidential power. On the other hand, they were devastated by the blow to their legal rights.¹²² The repeal of Jihan's Law resulted in the automatic reinstatement of Law No. 25 of 1929. The loss of a divorced woman's right under Jihan's Law to remain in her marital home until she remarried or lost custody of her children caused the precipitous eviction of scores of women from their homes.¹²³ In reaction, a diverse coalition of Egyptian women mobilized and appealed to Parliament to reenact Jihan's Law. Three weeks later, Parliament responded by enacting, for the first time in its history, a new personal status law, Law No. 100, which remains in effect today.¹²⁴ Once again, Egypt passed a personal status law at a seemingly opportune moment — this time, shortly before the UN Decade for Women End-of-Decade Conference in Nairobi.¹²⁵

V. THE COMPATIBILITY OF EGYPT'S RESERVATION TO ARTICLE 16 WITH THE OBJECT AND PURPOSE OF THE CONVENTION

The object and purpose of the Women's Convention is to eliminate all forms of discrimination against women. The type of action required of a party to facilitate this objective depends on how "discrimination

istic, ambitious, and feminist. She is outspoken, active in social and public affairs, and a cosmopolitan, international figure. Understandably, she appeals to the West. In Egypt her role as model is limited for she relates only to a particular kind of urban Egyptian woman. The vast majority of Egyptian women cannot relate to her. She is neither real nor meaningful within their conceptual order. Her style of life is not only nontraditional but anti-traditional, hence irrelevant and not to be emulated.

Id.

121. HIJAB, *supra* note 85, at 30. Many women activists, however, felt that the law was not comprehensive enough.

122. *Id.* at 31.

123. *Id.*

124. The first two personal status laws had been passed by royal or presidential decrees. *Id.* at 35. As previously noted, Law No. 100 resembles Jihan's Law in most respects. See ESPOSITO, *supra* note 51, at 61.

125. U.N. Doc. A/CONF.116/28 (1985).

against women" is defined. Article 1 of the Convention provides that discrimination exists when a woman suffers a limitation in her ability to enjoy or exercise either a "human right" or a "fundamental freedom."¹²⁶ Egypt's reservation to Article 16 states that a "wife's rights to divorce are contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband."¹²⁷ As previously noted, the compatibility rule for evaluating the permissibility of a reservation is intended to balance the goal of universal participation in a convention against the preservation of its integrity.¹²⁸ Permitting Egypt's reservation would promote universality by encouraging Egypt to adopt the Convention. Whether permitting that reservation would compromise the Convention's integrity, however, rests in part upon whether a woman's right to judicial divorce is viewed as either a human right or a fundamental freedom.

A. Textual Analysis

Article 16(1)(c) of the Convention addresses the issue of a woman's right to judicial divorce by ensuring women "the same rights and responsibilities during marriage and at its dissolution."¹²⁹ This provision suggests that if one spouse must acquire judicial permission to obtain a divorce, then so must the other. Article 16 mandates equal rights in the area of divorce. Therefore, equality in matters relating to divorce may be considered a fundamental right under the Women's Convention.

Egypt's explanation of its reservation to Article 16 states that Egyptian family law accords "equivalency" and "complementarity" of marital rights, including the right to divorce. Egypt's reservation compromises the integrity of the Women's Convention by imposing an asymmetrical procedure for obtaining divorce. That asymmetry violates the fundamental promotion of sameness mandated by the Convention under the guise of "complementarity," a notion that the Convention simply does not recognize.

Article 23, however, permits States to apply provisions of their own legislation which may be "more conducive to the achievement of equality between men and women."¹³⁰ Indirectly, Egypt invokes that

126. See *supra* note 7 and accompanying text for the Convention's complete definition of discrimination against women.

127. See *supra* note 28 for the full text of Egypt's reservation to Article 16.

128. See *supra* note 41 and accompanying text.

129. Women's Convention, *supra* note 1, at 20.

130. *Id.* at 22.

provision by asserting that "equivalency" and "complementarity" of rights and duties "guarantees true equality."¹³¹ The reservation reasons that because a husband is required to maintain his wife, he need not obtain a judicial divorce.

This Egyptian "equivalency" approach fails a "true equality" test. It is based on the assumption that it is possible and proper to balance the economic duties of a husband against the legal entitlements of a wife. It fails to recognize, for example, that an independently wealthy or self-supporting woman does not benefit from her husband's obligation of maintenance. Moreover, the majority of Egyptian women match the economic contribution of their husbands by cooking, cleaning, raising the children, and in the case of women in rural areas, tending to agricultural chores as well.¹³²

B. *The Necessity of Egypt's Reservations to Egyptian Adoption and Adherence*

As previously established, the compatibility rule of reservations requires that considerations of integrity be balanced against the objective of promoting universal adoption of a human rights convention. Proponents of the universality approach to reservations stress that the success of a convention depends on its adoption by as many states as possible. Those proponents focus less on the integration of a convention into the domestic law of individual parties. In the case of an instrument such as the Women's Convention, this interest in universal adoption is inherently at odds with the integrity of the agreement. Where a party adopts a convention but fails to enact internal reforms to implement that convention's provisions, the integrity of the convention is compromised.

Egypt would probably not have adopted the Women's Convention if it had been prohibited from entering its reservation to Article 16. Because Islamic law governs all family law in Egypt, it is unreasonable to expect that Egypt would replace Islamic family law with secular law immediately upon adoption of the Women's Convention. In that context, it is necessary to balance Egypt's adoption of the Convention against its ability to sustain and pursue the general objectives promoted by each of the Convention's provisions.

131. MULTILATERAL TREATIES, *supra* note 21, at 167.

132. See, e.g., James Toth, *Pride, Purdah, or Paychecks: What Maintains the Gender Division of Labor in Rural Egypt?*, 23 INT'L J. MIDDLE E. STUD. 213, 213-36 (1991).

1. Egypt's Reservation in the Social and Political Context

Given the turbulent history of personal status law in Egypt and the diversity of groups attempting to influence its future, including Islamic jurists, women activists, and politicians, Egypt must proceed cautiously in the reform of its family laws. A skeptic may assert that Egypt adopted the Women's Convention without truly intending to undertake reforms consistent with its provisions. However, in light of the ongoing debate in Egypt regarding women's rights, particularly in the family context, it appears that Egypt took a relatively bold step by adopting the Convention at all.¹³³ Moreover, Egypt explains its reservation to Article 16 in greater detail than the other Islamic states which made reservations to that provision.¹³⁴

2. Egypt's Reservation in the Context of Egyptian Jurisprudence

Any meaningful reform of personal status law in Egypt must occur within the framework of Islamic jurisprudence. On its face, Egypt's reservation to Article 16 suggests that prevailing marriage laws will remain unchanged "out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt and which may not be called in [sic] question."¹³⁵ However, since the turn of the century, such "firm religious beliefs" have repeatedly been called into question in Egypt.

The introduction of Islam into the Middle East improved the sta-

133. A discussion of actual reforms undertaken by Egypt that emanate from its adoption of the 1979 Convention goes beyond the scope of this comment.

134. Below are the full texts of the reservations of other Islamic states to Article 16:

Bangladesh: "The Government of the People's Republic of Bangladesh does not consider as binding upon itself the provisions of articles 2, 13(a) and 16.1(c) and (f) as they conflict with Sharia law based on Holy Quran and Sunna." MULTILATERAL TREATIES, *supra* note 21, at 166.

Iraq: "[T]he reservation to . . . [Article 16] shall be without prejudice to the provisions of the Islamic Shariah according women rights equivalent to the rights of their spouses so as to ensure a just balance between them." *Id.* at 169.

Jordan: "A reservation to the wording of article 16, paragraph (1)(c), relating to the rights arising upon the dissolution of marriage with regard to maintenance and compensation . . ." *Id.*

Tunisia: "The Tunisian Government considers itself not bound by article 16, paragraphs (c), (d) and (f) of the Convention and declares that paragraphs (g) and (h) of that article must not conflict with the provisions of the Personal Status Code concerning the granting of family names to children and the acquisition of property through inheritance." *Id.* at 171.

135. *Id.* at 167.

tus of Arab women. Moreover, reforms in the personal status law of Egypt have generally developed within the purview of Islamic principles. Accordingly, many traditionalists insist that the current state of Islamic law must be preserved. However, others argue, as did Muhammad Abduh, that a rapidly changing society necessitates reexamination and reinterpretation of that tradition of law. These reformists contend that Islam's improvement of women's lives should be treated as an ongoing process, rather than a calcified historical event.¹³⁶ However, as the history of family law reform in Egypt clearly demonstrates, the process by which such reforms are enacted is just as important to the longevity and force of their acceptance as the fact that they are enacted.

Egypt's experience with Jihan's Law shows that reforms will not endure when a large segment of the population believes that those reforms have been imposed by a mistrusted leader through undemocratic means. The history of Islamic jurisprudence in Egypt, moreover, demonstrates that some Islamic jurists and traditional Egyptians react strongly against reforms, clinging fiercely to *Taqlid*, particularly if they perceive such reforms to be manifestations of encroaching western domination.¹³⁷ The more Egyptians perceive the call for social reform to be a call from within the Arab, Islamic community, the more they are likely to call for an opening of the gate of *Ijtihad* to accommodate those reforms.

From their experience with Jihan's Law, Egyptian women learned that true reform of personal status law would require support from within their own country's legal tradition. They also learned that women themselves must be actively involved in future family law reform to ensure its lasting effect.¹³⁸ The fact that Egyptian women, with

136. In the Afterword of her widely acclaimed book, *THE HIDDEN FACE OF EVE*, the Egyptian physician and feminist, Nawal El Saadawi, summarizes a view held by some Arab feminists on the role of Islam in the advancement of women's rights:

The oppression of women is not essentially due to religious ideologies, or to whether she is born in a Western or Eastern society, but derives its roots from the class and patriarchal system that has ruled over human beings ever since slavery started to hold sway. . . . In the traditions and culture of the Arabs and Islam, there are positive aspects which must be sought for and emphasized. Negative aspects should be exposed and discarded without hesitation. Women at the time of the Prophet obtained rights of which today they are deprived in most Arab countries.

NAWAL EL SAADAWI, *THE HIDDEN FACE OF EVE* 211, 212 (1980).

137. See *supra* note 90 and accompanying text.

138. During the period between the repeal of Law No. 44 and the enactment of Law No. 100, when Egyptian women were mobilizing, Hussain Ahmad Amin, a liberal

the support of Islamic jurists, were responsible for the democratic enactment of Law No. 100 of 1985 suggests that the law will endure, be widely enforced, and provide the springboard for future reforms. Such future reforms may eventually include the abolition of a husband's unilateral right to extra-judicial divorce, which currently prevents Egypt from withdrawing its reservation to Article 16 of the Women's Convention.

CONCLUSION

In analyzing whether Egypt's reservations to Articles 2, 9, and 16 of the Women's Convention are permissible, this comment has explored the general framework of international law regarding reservations to human rights conventions. The compatibility rule governing the permissibility of reservations to human rights conventions balances the degree to which a reservation violates the integrity of a convention against the extent to which that reservation facilitates universal adoption.

Under the compatibility rule, Egypt's reservation to Article 2 is impermissible because it is a general reservation to the most important provision of the Convention. Accordingly, that reservation so seriously undermines the integrity of the Convention that it renders meaningless any advancement of its universal adoption. Thus, Egypt's reservation to Article 2 is incompatible with the object and purpose of the Women's Convention.

Egypt's reservation to Article 9 is also impermissible because it does not provide an adequate justification for Egypt's inability to grant women the fundamental right of equality with respect to the nationality of their children. A reservation that has the effect of denying women any fundamental right provided by the Women's Convention compromises the integrity of that instrument. Neither the wording nor the

columnist for the Egyptian daily, AL MUSSAWAR, emphasized the importance of reform from within:

As for our women, in spite of my sympathies for their plight, I say frankly I am not sorry to see them lose rights that were not the fruits of real efforts on their part. How easy it is to lose rights that come without struggle. The conditions of women all over the world were similar at one time, no better than those of slaves. The European or American woman only got her rights after a bitter fight and as the fruit of centuries of development and struggle. As for our society . . . these rights came because of two or three books written by men earlier this century, because of the struggle of some wives of prominent men, and because our governments want the West to look upon them as enlightened. They are always rights that are given, not rights that are taken.

As translated in HIJAB, *supra* note 85, at 33.

tone of Egypt's reservation to Article 9 support, the proposition that Egypt would be unable to maintain its adoption of the Convention if it were to withdraw this reservation. In the absence of such support, any advancement of universal adoption of the Convention served by Egypt's reservation to Article 9 is clearly outweighed by that reservation's violation of the integrity of the agreement.

In contrast, the text of Egypt's reservation to Article 16, as well as the turbulent history of personal status law in Egypt, demonstrate that until the government of Egypt enacts reforms consistent with Article 16 that are religiously and politically acceptable to the Egyptian population, Egypt must maintain its reservation to that article in order to remain a party to the Convention. Moreover, unlike the reservation to Article 9, Egypt's reservation to Article 16 provides specific religious justifications which, Egypt maintains, are superior to the underlying secular rationale of Article 16's provisions promoting marital equality. This reservation implicitly invokes Article 23, which provides that the Convention shall not supersede domestic legislation which is "more conducive to the achievement of equality."¹³⁹ Thus, the permissibility of this reservation must be considered in the context of the development of Islamic and Egyptian law and of Egypt's social and political history to ascertain whether Egypt's laws on divorce are, in fact, more conducive to the achievement of equality than is Article 16 of the Women's Convention.

Based on consideration of the legal and political context of Egypt's reservation to Article 16, this comment concludes that Egypt's notion of "complementarity" of rights and obligations between spouses violates the integrity of the Women's Convention by denying women the fundamental right to equality with men in all matters relating to marriage and divorce. Egypt's laws on divorce are not more conducive to sexual equality than is Article 16 of the Convention to the extent that they balance a woman's legal rights against her husband's economic obligations for maintenance. However, because Egypt must maintain its reservation to Article 16 to ensure Egypt's continued participation in the Convention, that reservation is not entirely inconsistent with the object and purpose of the Convention. The narrow substantive breach of integrity posed by Egypt's reservation to Article 16 is outweighed by the broad promotion of universal application of the Women's Convention served by that reservation.

The debate surrounding personal status law in Egypt during the twentieth century indicates a serious commitment among Egyptian

139. Women's Convention, *supra* note 1, at 22.

women, jurists, and politicians to strengthen the marital rights of women. The legal and political history of family law reform in Egypt shows strong potential for the abolition of extra-judicial divorce by husbands in that country. If that comes to pass, Egypt will be better able to withdraw its reservation to Article 16 of the Women's Convention.

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